91-388

Supreme Court, U.S.
FILED
SEP 6 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

JEFFERY R. POWELL, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRUCE J. ROSEN - counsel of record
GIESEN & BERMAN, S.C.
306 East Wilson Street, Suite 200
Madison, Wisconsin 53703
Telephone: (608) 255-8200

On behalf of Petitioner
Jeffery R. Powell

QUESTION PRESENTED

1. Did the Court of Appeals for the Seventh Circuit err in holding that the petitioner, who had entrusted his camper truck to another for a limited time and purpose, and who had given specific instructions concerning the use of the truck, did not have standing to challenge an unlawful, unconstitutional and pretextual seizure and ensuing search by police of that truck?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of this action, that is, the petitioner, Jeffery R. Powell, and the respondent, United States of America.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case.	3
Reasons for Granting The Petition.	12
The Petition Should Be Granted Because The Decision Of The Seventh Circuit In This Case Curtails Fourth Amendment Rights In An Unprecedented Fashion.	19
Conclusion	23

Appendix A:

Seventh Circuit Slip Opinion . .	1a
Judge Warren's Opinion	13a
Magistrate Bittner's Supplemental Recommendation	54a
Magistrate Bittner's Recommendation.	66a
Order on Rehearing	102a

TABLE OF AUTHORITIES

Page

Cases:

Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) 16

United States v. Dotson, 817 F.2d 1127 (5th Cir. 1987). 15, 20

United States v. Erwin, 875 F.2d 268 (10th Cir. 1989). . . 19

United States v. Jacobson, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) . . . 13, 14, 22

United States v. Johns, 707 F.2d 1093 (9th Cir. 1983), reversed on other grounds 469 U.S. 479 (1985). . 13, 16, 17, 20

United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984) . . . 18

United States v. Powell, 929 F.2d 1190 (7th Cir. 1991) 4, 11, 20

United States v. Schaefer, 637 F.2d 200 (3rd Cir. 1980) . 13, 15

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 23

Statutes and Rules: **Page**

18 U.S.C. §2 3

18 U.S.C. §1952(a)(3). 3

18 U.S.C. §3231. 3

21 U.S.C. §841(a)(1) 3

21 U.S.C. §846 3

28 U.S.C. §1254(1) 2

28 U.S.C. §1291. 4

28 U.S.C. §1294. 4

Rule 11(a)(2), Fed.R.Cr.P. 3

Fourth Amendment . . . 2, 13, 20, 21, 22

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JEFFERY R. POWELL, Petitioner

vs.

UNITED STATES OF AMERICA

The petitioner, Jeffery R. Powell, petitions for a Writ of Certiorari to review a judgment and order of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The panel opinion of the Seventh Circuit (App. Infra, 1a - 12a) is reported at 929 F.2d 1190 (7th Cir. 1991). The opinion of the district court (App. Infra, 13a - 53a) is unreported.

JURISDICTION

The Order of the Seventh Circuit Court of Appeals denying rehearing was entered on June 11, 1991. The court's opinion and order was entered April 11, 1991. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case involved the prosecution of the petitioner, Jeffery Powell under a three count Indictment returned in the United States District Court for the Eastern District of Wisconsin charging petitioner with violations of 18 U.S.C. §§ 2 and 1952(a)(3) and 21 U.S.C. §841(a)(1) and §846. The petitioner entered a conditional guilty plea under Rule 11(a)(2), Fed.R.Cr.P. to a one count Information which charged petitioner with a violation of conspiracy to possess with intent to distribute marijuana under Title 21 U.S.C. §846 and 18 U.S.C. §2.

Jurisdiction of the United States District Court in the first instance was pursuant to Title 18 U.S.C. §3231 because the petitioner had been charged with an offense against the laws of the United

States. Jurisdiction of the United States Court of Appeals for the Seventh Circuit was based on Title 28 U.S.C. §§1291 and 1294.

On November 7, 1989, the petitioner was sentenced to a term of imprisonment of seventy five (75) months, a fine of five thousand ($5,000.00) dollars, and supervised release for a period of five (5) years. He appealed from that conviction and the United States Court of Appeals for the Seventh Circuit affirmed in United States v. Powell, 929 F.2d 1190 (7th Cir. 1991). Petitioner's request for rehearing was denied on June 11, 1991.

This case began on December 17, 1988, when Trooper Richard Haycock of the Utah State Highway Patrol stopped a white 1985 Chevrolet pickup with a large plastic shell known as a camper back over the bed.

The stop was made on a very rural and desolate section of Interstate 70 in Utah, ostensibly for failing to signal while merging onto the interstate from the entrance lane. Trooper Haycock also claimed to be looking for a possible violation of vehicle equipment laws, since the failure to activate the turn signal suggested to him that the signal might be inoperative. However, the trooper issued no citation to the driver. The pickup truck was being driven by Michael Maroda and the Certificate of Title, issued by the State of Wyoming, indicated the truck was owned by "J.R. Powell." At the time of the stop, Michael Maroda informed Trooper Haycock that the truck was owned by Jeffery Powell.

Michael Maroda and the pickup truck were detained by the trooper who

ultimately interrogated Maroda and accused him of carrying marijuana inside the truck. Maroda responded that he would show Haycock that there was no marijuana in the truck and unlocked and opened the back door of the camper portion in order for Trooper Haycock to look inside the back of the truck. Trooper Haycock claimed that on the opening of the truck's back door he was immediately able to smell the odor of marijuana emanating from the back of the truck. At this point, Trooper Haycock handcuffed Maroda and called for backup officers. While Trooper Haycock was waiting for the backup officers to arrive, he entered the back of the truck and lifted the carpeting from the floor of the interior and discovered an area which had been closed off with plywood and had been screwed down with all cracks filled

with caulk. When backup officers arrived, Trooper Haycock began to disassemble the floor in the back of the truck. After removing the floor, Haycock discovered several objects wrapped in self-adhesive tape which were later found to be bundles of marijuana. Maroda was then arrested and advised of his Miranda rights. Maroda waived those rights and agreed to talk to and cooperate with authorities. Maroda stated that he had been hired by Jeffery Powell to drive the truck and its contents from Arizona to West Bend, Wisconsin.

After obtaining Maroda's statements and agreement to cooperate, the truck was reassembled and driven by members of Haycock's department to West Bend while Maroda was flown to Wisconsin in the company of a DEA agent and Utah law enforcement personnel. A controlled

delivery of the truck and its contents to Jeffery Powell by Maroda was arranged, and on December 19, 1988, Maroda drove the truck, which contained three DEA agents in the camper portion, to a motel parking lot in West Bend where Maroda met the petitioner. Mr. Powell instructed Maroda to follow him in the truck, and when the pickup stopped in the driveway of a house in West Bend, the DEA agents emerged and arrested the petitioner. Immediately thereafter, the petitioner and his automobile were searched, and various papers, keys, and currency were seized. Petitioner filed motions to suppress in the district court and at an evidentiary hearing on the motions to suppress, Michael Maroda testified. Maroda testified he had been hired by petitioner to drive the pickup truck from Arizona to

West Bend, Wisconsin. Maroda stated that Mr. Powell entrusted possession of the truck to Maroda for the limited purpose of delivering it to West Bend and gave Maroda explicit instructions to that effect. Mr. Powell authorized Maroda only to drive the truck directly to West Bend. Maroda was instructed to not deviate from the designated route; to obey all traffic laws; to not pick up passengers, and to not let governmental authorities search the truck. Mr. Maroda was instructed to go into the back of the truck only to care for Mr. Powell's dog or to store dog food and water and Mr. Maroda's luggage; to keep all doors on the truck locked; and to not open the compartments in the back of the truck until after Maroda had completed his trip to Wisconsin. Maroda was to receive a monetary bonus if the truck was

delivered by a certain time. In addition, the petitioner gave Maroda a broken key to the back door of the pick up to show to governmental authorities if asked to unlock the back door as an excuse to not do so. Curtains had been installed on the camper windows in order to obscure the view into the interior.

The Court of Appeals first reviewed the district court's determination that the stop of Maroda for the purported unlawful failure to signal his merge from the on ramp onto the highway was not pretextual. The Court of Appeals rejected the conclusion of the district court and held that neither logic nor deference to the views of administrative agencies supported an interpretation of the Utah statute that required motorists in Utah to signal merges from on ramps onto highways.

Therefore, because Haycock did not have probable cause to believe that Maroda had committed or was committing an offense when Haycock stopped him, Haycock's stop of the petitioner's pickup was invalid. United States v. Powell, 929 F.2d at 1194. However, the Court of Appeals also held that the petitioner did not have standing to object to the unlawful stop, seizure and ensuing search of the pickup truck. The Court of Appeals announced a broad rule that a vehicle owner who was not in his car at the time it is stopped should not, absent unusual circumstances, have standing to object to the stop.

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals for the Seventh Circuit is in conflict with those of other circuits which hold that one who has an ownership or possessory interest in a vehicle has standing to challenge the stop and subsequent search of the vehicle notwithstanding the fact that the owner was not in the vehicle at the time of the stop and seizure. The decision of the Seventh Circuit is directly contrary to those other holdings because the Seventh Circuit in this case held that a vehicle owner who is not in his car at the time it is stopped should not, absent unusual circumstances, have standing to object to that stop. This Petition should be granted because this holding of the Seventh Circuit is in conflict with such

decisions as United States v. Schaefer, 637 F.2d 200 (3rd Cir. 1980) and the decision of the Ninth Circuit in United States v. Johns, 707 F.2d 1093 (9th Cir. 1983), reversed on other grounds 469 U.S. 478 (1985).

For Fourth Amendment purposes, a "seizure" of property occurs "when there is some meaningful interference with an individual's possessory interest in that property." United States v. Jacobson, 466 U.S. 109, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). When the government takes control of property, possession of which has been entrusted by the property's owner to another, there is nonetheless interference with the owner's possessory interest in the property. In United States v. Jacobson, supra, government agents took custody of a package being

transported for the owner of the package by a private carrier. The court found that the government's "assertion of dominion and control over the package and its contents constituted a seizure implicating the owner's Fourth Amendment right." 104 S.Ct. at 1660. The Court further held that the fact that the owner had given possession of the package to the private carrier was not relevant:

> Although respondents had entrusted possession of the item to Federal Express, the decision by governmental authorities to assert dominion and control over the package for their own purposes clearly constituted a "seizure" though not necessarily an unreasonable one. 104 S.Ct. at 1660, N. 18.

Other circuits have repeatedly applied the above-cited principle and found that one who had an ownership or possessory interest in a vehicle had standing to challenge the stop and subsequent search

of the vehicle, notwithstanding the fact that the owner was not in the vehicle at the time of the stop and seizure. The Third Circuit, in United States v. Schaefer, 637 F.2d 200 (3rd Cir. 1980) is just such a case. In Schaefer, a number of trucks which were owned by the president of the corporation and which were being used in the course of business of the corporation were stopped by police in order to weigh the trucks and obtain the weigh bills from the truck's drivers, none of whom were owners of the trucks. The Schaefer Court held the stop of the trucks was a seizure which implicated both the owner's and the corporation's possessory interests in the trucks. Id. at 202-203.

Again, in United States v. Dotson, 817 F.2d 1127 (5th Cir. 1987), the Fifth

Circuit extended standing to object to a search to one who was not even the legal owner of a vehicle who had allowed another to use that vehicle.

> "Thus, the fact that Dotson was not the legal owner of the car, while certainly an important consideration of the court's Fourth Amendment analysis, is not dispositive of the question. As the legitimate possessor of the car for an extended period of time, Dotson held a 'property [or] possessory interest in the automobile' sufficient to constitute 'an interest of the defendant which the Fourth Amendment was designed to protect.'" [Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 428-9, 58 L.Ed.2d 387 (1978).] Id. at 1135.

The Ninth Circuit, in a series of cases, has conferred standing on persons who were not present at the time of a vehicle stop and seizure. Illustrative of those cases is the decision of the Ninth Circuit in United States v. Johns, 707 F.2d 1093 (9th Cir. 1983), reversed on

other grounds, 469 U.S. 478 (1985). In Johns, United States Customs officers, suspecting that a drug transaction might occur, began ground and air surveillance of two trucks. Shortly after the trucks stopped near a remote air strip, two airplanes landed in sequence. After both planes left, the officers approached the two trucks and smelled the odor of marijuana in the general area of the trucks. An inspection of the interior of the trucks was made and several sealed boxes and bags of marijuana were discovered therein. Officers arrested the defendants present at the two trucks and later arrested the two pilots. The district court found that the pilots had standing, although they had departed in their planes before the seizure and search of the vehicles and the seizure of the

containers of marijuana. The Court found that the pilots had standing to object because they shared a bailor/bailee relationship with the other defendants who were not to be paid until after delivery of the marijuana. The Court reasoned that the pilots met their burden of showing a reasonable expectation of privacy based on their formalized arrangement with the other five defendants for the transportation of the marijuana. Id. at 1100.

A year later in United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984), the Court again conferred standing on persons involved in joint control and supervision of a place. The Court in Pollock wrote:

> "A defendant who enters into an arrangement that indicates joint control and supervision of the place searched may challenge a search of the place." Id. at

1465.

The holding of the Seventh Circuit is in conflict with all of these cases from other circuits and certiorari should be granted in order to resolve this conflict.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE SEVENTH CIRCUIT IN THIS CASE CURTAILS FOURTH AMENDMENT RIGHTS IN AN UNPRECEDENTED FASHION.

The Seventh Circuit's decision curtails Fourth Amendment rights in an unprecedented fashion. The Seventh Circuit's decision in this case apparently relies in part on the decision of the Tenth Circuit in United States v. Erwin, 875 F.2d 268 (10th Cir. 1989). In Erwin, the Tenth Circuit extended standing to the passenger of a vehicle to challenge the stop of an automobile on Fourth Amendment grounds. The Court in Erwin, however, did not preclude others from challenging such

a stop. The Seventh Circuit, however, unjustifiably extended Erwin and enunciated a new, highly constrictive interpretation of the Fourth Amendment whereby

> "a vehicle owner who was not in his car at the time it is stopped should not, absent unusual circumstances, . . . have standing to object to the stop." Powell, supra, 929 F.2d at 1195.

This holding is in diametric conflict with the principles set forth in United States v. Dotson, supra, and United States v. Johns, supra. Moreover, the logical extension of the Seventh Circuit's holding is a dangerous one which would essentially negate all Fourth Amendment protections of one who entrusts property to another in a bailment situation. Application of the Court's reasoning in this case would result in standing being denied to, for

example, one who is not present when his or her safe deposit box is seized and searched without a warrant, or even when an individual's house is seized and searched in the owner's absence. The Seventh Circuit denies standing in virtually every commonplace bailment situation. It is not simply petitioner's interest in using the highways undisturbed by random and intrusive police action which is at issue in this case. A person, such as the petitioner, who has been subjected to a meaningful interference with his possessory interests in his property has been subjected to a seizure for Fourth Amendment purposes and has standing to contest that seizure. The Fourth Amendment guarantees the right of the people "to be secure in their persons, houses, papers and effects against

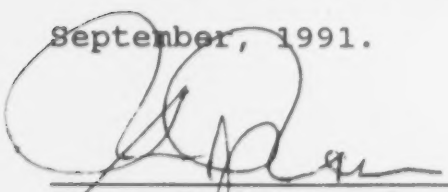
unreasonable searches and seizures." In this case, as shown by the record below, the petitioner Jeffery Powell was subjected to just such an unreasonable, and hence unconstitutional seizure and subsequent search of his pickup truck and the contents of that truck. Under the authority of the foregoing cases and the principles enunciated in United States v. Jacobson, supra, he should be deemed to have standing to contest the seizure. The Seventh Circuit held that the seizure of the truck was unlawful under the Fourth Amendment because that seizure was not based upon probable cause. Therefore, the ensuing search of petitioner Jeffery Powell's truck was also unlawful. If the initial stop was unlawful, the seized contraband was clearly subject to exclusion under the "fruit of the

poisonous tree" doctrine. Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 415, 9 L.Ed.2d 441 (1963); United States v. Erwin, supra, at 269, N. 2).

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted this 3rd day of September, 1991.



Bruce J. Rosen of counsel to
Charles W. Giesen and
Morris D. Berman
Giesen & Berman, S.C.
Attorneys for Jeffery Powell
306 East Wilson Street
P.O. Box 909
Madison, WI 53701
(608) 255-8200

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-3509

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY RICHARD POWELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 88 CR 175—**Robert W. Warren**, *Chief Judge.*

ARGUED DECEMBER 12, 1990—DECIDED APRIL 11, 1991

Before BAUER, *Chief Judge*, FLAUM and KANNE, *Circuit Judges.*

FLAUM, *Circuit Judge.* Jeffrey Powell entered a conditional plea of guilty to one count of conspiring to distribute marijuana in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. He reserved his right to appeal the district court's denial of his motion to suppress evidence obtained from a vehicle stop and subsequent searches, as well as his arrest. We conclude that he has no standing to challenge the vehicle stop, and that the subsequent searches did not violate his rights under the Fourth Amendment. We consequently affirm the conviction.

I. FACTS AND PRIOR PROCEEDINGS

State trooper Richard Haycock patrols the highways of southern Utah. On December 17, 1988, he came upon a pickup truck with a large plastic shell known as a camper back over the bed. The pickup approached Interstate 70, a major east-west highway, from a smaller road that runs north from Arizona. As the pickup merged onto I-70 from the on-ramp, its driver failed to announce his movement by flashing the car's directionals or using a hand motion. Officer Haycock signalled the camper's driver to pull over to the shoulder of the road.

After stopping, the pickup's driver left the cab of his truck and walked toward the rear of the camper shell, where Haycock met him. Haycock peered through a window into the camper-back's interior, and observed that the floor was raised above the level of the truck bed, and that the ceiling of the camper back's interior was approximately a foot lower than the roof, creating two storage spaces. The driver of the truck produced an Arizona driver's license bearing the name Michael Maroda. The truck's title documents, however, were issued in Wyoming to a Jeffrey Powell. When questioned by Haycock, Maroda informed him that the truck he was driving belonged to Powell, and that he was driving it from Arizona to Cheyenne, Wyoming, where he was to meet Powell. The address given on Powell's registration, however, was not Cheyenne, but Evanston, across the state.

As the conversation between Haycock and Maroda progressed Maroda appeared increasingly nervous. Based on his five years of experience as a trooper and the numerous drug seizures he had made during that time, Haycock suspected that Maroda was a courier transporting marijuana. Not one to beat around the bush, Haycock "just point blank asked Mr. Maroda how much marijuana was in the truck." Evidentiary Hearing Transcript at 40. Maroda responded that he would show Haycock that there was none. When Maroda opened the door of the camper back, the strong scent of fresh marijuana rose up to greet Haycock's expert nostrils.

Upon smelling the marijuana, Haycock frisked Maroda for weapons, handcuffed him, and called for backup. With Maroda standing on the side of the road, Haycock began to examine the concealed areas of the camper back. Seeing Haycock struggle with the screws that secured the plywood floor, Maroda offered him the use of an electric screwdriver kept in the cab of the truck. Upon opening the floor and ceiling panels, Haycock observed a number of large bundles wrapped in tape. At this point, the trooper read Maroda his rights.

Haycock, however, had his sights on bigger game than Maroda. He asked Maroda to whom he was delivering his load, and Maroda responded that it was Jeffrey Powell, and that he was en route to West Bend, Wisconsin to meet him. Maroda showed Haycock a notebook with information on the route Maroda was to take to Wisconsin, as well as the phone number Powell had instructed Maroda to call when he reached West Bend. With the assistance of federal drug enforcement agents based in Milwaukee, Haycock set to work arranging the delivery of the marijuana-laden truck to Powell. He arranged for state troopers to reassemble the camper back and drive the pickup to Wisconsin and for other troopers to fly with Maroda from Salt Lake City to Wisconsin. When Maroda arrived in Milwaukee, he told DEA agents that he had been contacted by Powell in Arizona and offered $7,000 to drive the pickup to Wisconsin. Powell told Maroda that when he delivered the marijuana he would be given $100,000 in cash to store for Powell in Arizona, as well as a plane ticket from Chicago to Arizona.

DEA agents escorted Maroda to West Bend, where on December 19, 1988, two days after the Utah vehicle stop, he was reunited with the truck. While three law enforcement officers hid in the camper back, Maroda called the phone number Powell had given him and was told to wait where he was. A few minutes later, Powell drove up in his car and instructed Maroda to follow him. When the pickup stopped in the driveway of a house in West Bend, the DEA agents emerged and arrested Powell. A search

of Powell's person revealed a small amount of cocaine. A search of the trunk of his car revealed a suitcase containing $111,000 in cash and a small amount of marijuana.

A grand jury in the Eastern District of Wisconsin indicted Powell on several drug-related charges and one violation of the Travel Act. Powell filed motions to suppress his arrest and all evidence found in the truck, on his person, or in his car, on the ground that they were obtained in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. He challenged the vehicle stop in Utah, Trooper Haycock's subsequent visual inspection and physical search of the pickup, and the Wisconsin searches of his person and car.

An evidentiary hearing on Powell's motion to suppress was convened before a magistrate, who heard testimony from Haycock and the DEA agents who arrested Powell and searched him and his car. Maroda was subpoenaed but failed to appear at the initial hearing. The magistrate then issued an preliminary recommendation to the district court that all of Powell's motions to suppress be denied. This decision was based on the magistrate's determination that Powell lacked standing to challenge the search because he had not presented any evidence that he was the owner of the truck. The magistrate concluded in the alternative, however, that if the district court were to decide that Powell did have standing to contest the stop of the truck, his motions to suppress should be granted because the Utah statute that Trooper Haywood claimed as the basis for the stop did not require motorists entering a divided highway to signal their move from an on-ramp onto a highway. The magistrate labeled both these conclusions as preliminary and invited Powell to renew his motion to suppress if and when Maroda testified.

A few weeks later, Maroda appeared before the magistrate at a supplemental hearing. He was questioned about the vehicle registration found in the truck at the time of the vehicle stop, and identified the signature on the registration as Powell's. This fact, the magistrate ruled,

sufficed to establish that Powell had standing to challenge Trooper Haycock's stop of the pickup. However, the magistrate concluded that the consent Maroda gave to Officer Haycock's search of the truck wiped away the taint of the prior unconstitutional stop. Accordingly, the magistrate recommended that the district court deny Powell's motions to suppress.

The district court disagreed with the magistrate's conclusion that the Utah statute Officer Haycock relied on did not require vehicles entering limited access highways to signal their lane changes. According to the district court, the statute, while ambiguous, could be read to require a motorist entering a highway to signal, and that Officer Haycock's stop was supported by Utah traffic law and therefore was not pretextual. Turning to the question of Powell's standing to challenge the stop, the district court rejected the magistrate's conclusion that Maroda's testimony and the other evidence presented at the supplemental suppression hearing was sufficient to establish that Powell owned the pickup. Finding that "the defendant has not proven he had the right to control the use of or exclude others from using the vehicle," Decision and Order at 20, the district court denied Powell's motions to suppress on the ground that he had no standing to challenge Officer Haycock's stop of the truck driven by Maroda. Following the denial of his suppression motions, Powell entered a conditional plea of guilty, reserving the right to appeal the district court's refusal to suppress the fruits of Haycock's vehicle stop.

II. WAS THE STOP VALID?

All parties concede that Maroda failed to signal his merge from the on-ramp onto Interstate 70. Utah Code Ann. § 41-6-69(1)(a) (1987) provides that "[a] person may not turn a vehicle or move right or left upon a roadway or change lanes until the . . . appropriate signal has been given." As applied to the facts before us, the phrase "may not turn a vehicle or move right or left upon a roadway

or change lanes" is ambiguous, because it does not answer the question of whether a highway on-ramp is a "lane" considered part of the "roadway" itself. Neither does the definition of "roadway" contained in Utah Code Ann. § 41-6-1(37) (1987). No Utah court has clarified this ambiguity; cases decided under the current version of § 41-6-69 and its predecessors concern accidents at intersections, *see, e.g., Hansen v. Nicholas Moving & Storage*, 451 F.2d 319 (10th Cir. 1971); *Cederloff v. Whited*, 110 Utah 45, 169 P.2d 777 (1946); *Miller v. Utah Light & Traction*, 96 Utah 369, 86 P.2d 37 (1939).

Questions of statutory interpretation are questions of law, which we review *de novo*. *McNary v. Hatian Refugee Center*, 111 S. Ct. 888, 897 (1991); *United States v. Teta*, 918 F.2d 1329, 1332 (7th Cir. 1990). As did the magistrate, we find the administrative interpretation of § 41-6-69 contained in the Utah Driver Handbook (rev. ed. 1988) helpful in interpreting the statute. The Handbook is distributed by the State Department of Public Safety (the state agency responsible for highway safety, Utah Code Ann. § 41-13-4(1)) to Utah residents studying for the state's operator's license examination. It "contains the rules which [motorists] must follow when operating any motor vehicle on the road in Utah." *Id.* at title page. In instructing drivers how to turn at intersections, the Handbook requires the use of signals. *Id.* at 13-14. However, the Handbook does not instruct drivers to signal when entering freeways, either in its instructions concerning freeway driving or in a diagram showing procedures to be followed by motorists merging from an on-ramp onto a highway. *Id.* at 52-54. For want of a better guide to the application of the statute to the facts in this case, we defer to the Handbook, which presents the views of the administrative agency charged with enforcing Utah's traffic laws. *Chemical Mfrs. Assn. v. NRDC*, 470 U.S. 116, 125 (1985); *Wisconsin v. Bowen*, 797 F.2d 391, 397 (7th Cir. 1986); *Concerned Parents of Stepchildren v. Mitchell*, 645 P.2d 629, 633 (Utah 1982); *Technomedical Labs v. Utah Securities Div.*, 744 P.2d 320, 323 (Utah Ct. App. 1987).

Moreover, as the magistrate recognized, requiring motorists to signal a merge from an on-ramp to the right lane of a highway does not serve the usual function of signaling, namely giving notice to other motorists of a lane change or turn. The only reason to use an on-ramp is to enter a highway, so a motorist on a highway does not need to see a turn signal to know that a vehicle she observes on an adjacent on-ramp wishes to merge. Furthermore, most on-ramps approach highways at an angle before curving to parallel the highway. Because of the curve and the space between the highway and the more distant portions of the on-ramp, for most of the length of the on-ramp before the turn signal (which the Utah statute requires be given for at least three seconds before a lane change, § 41-6-69(1)(b)) could not be seen by motorists already on the highway. We agree with the magistrate that neither logic or deference to the views of administrative agencies supports an interpretation of § 41-6-69 that requires motorists in Utah to signal merges from on-ramps onto highways. Since, under this interpretation of the statute, Officer Haycock did not "have probable cause to believe that [Maroda] had committed or was committing an offense" when he stopped him, *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989), his stop was invalid.

III. DOES POWELL HAVE STANDING TO CHALLENGE THE STOP?

Our conclusion that Officer Haycock's stop of the pickup was not supported by probable cause that a motor vehicle violation had occurred does not, however, lead us to reverse the district court's denial of Powell's motions to suppress all evidence derived from the vehicle stop as well as his arrest. Rather, it leads to the question of whether Powell has sustained his burden of showing that he had a legitimate expectation of privacy implicated by the invalid vehicle stop. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *United States v. Duprey*, 895 F.2d 303, 309 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1927 (1990). This

requirement, often labeled Fourth Amendment standing, is rooted in the principle "that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman v. United States*, 394 U.S. 165, 171-72 (1969).

In considering the question of Powell's standing to challenge the stop of the truck, both the magistrate and the district court focused on the question of whether Powell had established a possessory interest in the vehicle. We do not reach the question of whether Powell owned the truck. We believe the better view is that ownership of a vehicle is largely irrelevant to the question of whether a given defendant has standing to challenge the stop of that vehicle.

When resolving issues of Fourth Amendment standing, it is important to distinguish between different government intrusions that implicate different constitutionally protected interests. Searches implicate expectations of privacy in the places or things searched. Possessory interests are often important in deciding who has standing to challenge a search because of our society's shared belief that, to a greater or lesser extent, ownership carries with it a right to exclude. Ownership creates, in other words, an expectation of privacy "that society is prepared to recognize as 'reasonable.' "[1] *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Fourth Amendment protects this expectation.

---

[1] Of course, even in the context of searches, ownership is not dispositive of the question of standing. As the Supreme Court observed in *Mancusi v. DeForte*, "capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from government intrusion." 392 U.S. 364, 368 (1968); *see also United States v. Salvucci*, 448 U.S. 83, 91 (1980) ("property rights are neither the beginning nor the end of this Court's inquiry" into Fourth Amendment standing).

By contrast to the expectation of privacy in places and things implicated by a search, the interests implicated by a vehicle stop are motorists' "freedom from random, unauthorized, investigatory seizures," *Michigan Dept. of Police v. Sitz*, 110 S. Ct. 2481, 2492 (1990) (Stevens, J., dissenting), and the interest in avoiding the "substantial anxiety," *Delaware v. Prouse*, 440 U.S. 648, 657 (1979), these stops may create. Both these interests are personal to the driver and passengers in the car stopped, who have their travel interrupted by the sight of a state patrol cruiser or police car looming large in the rear view mirror, are detained on the side of the road, have their identifying documents inspected by the trooper or policeman, and may even be asked to leave their vehicles for the duration of the questioning, *see Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

The different interests implicated by searches and vehicle stops have, not surprisingly, led courts to develop different rules concerning who may challenge a stop and who may challenge a search. In *Rakas v. Illinois*, 439 U.S. 128 (1979), the Supreme Court held that passengers in an automobile who "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized," had no standing to challenge the search of the car in which they were driving. *Id.* at 148. By contrast, numerous state courts and one federal appeals court have concluded that passengers do have standing to challenge a vehicle stop. *See, e.g, United States v. Erwin*, 875 F.2d 268, 270 (10th Cir. 1989); *State v. Harms*, 233 Neb. 882, 449 N.W.2d 1, 4 (1989) (collecting cases); *People v. Millan*, 69 N.Y.2d 514, 516, 508 N.E.2d 903, 904 (1987); *State v. Epperson*, 237 Kan. 707, 703 P.2d 761, 768-69 (1985); *State v. Haworth*, 106 Idaho 405, 405-06, 679 P.2d 1123, 1123-24 (1984); *State v. Eis*, 348 N.W.2d 224, 226 (Iowa, 1984); *People v. Bradi*, 107 Ill. App.3d 594, 437 N.E.2d 1285, 1288 (2d Dept. 1982); *State v. DeMasi*, 419 A.2d 285, 294-95 (R.I., 1980), *cert. granted and decision vacated on other grounds*, 452 U.S. 934 (1981).

These cases recognize that the intrusion a vehicle stop causes is personal to those in the car when it occurs. The

personal nature of the interests implicated by a vehicle stop persuade us that a vehicle owner who is not in his car at the time it is stopped should not, absent unusual circumstances not present in this case, have standing to object to the stop. It is conceivable that a stop might implicate a vehicle owner's possessory interests, as where the stop meaningfully deprives the vehicle owner of the anticipated use of his car or truck. As in so much of the law of search and seizure, the infinite factual permutations with which courts may be faced caution against formulating bright line rules.

No bright line is needed, however, to decide this case. Powell gave his truck to Maroda not for a drive around the block but for a three-day, 2,000 mile journey across the better part of the continental United States. At the time Officer Haycock stopped Maroda, Powell was over 1,000 miles from the point in southern Utah where the constitutional violation occurred and two days from Maroda's expected arrival. The portion of the detention of the truck that occurred before Officer Haycock came to reasonably suspect that Maroda might be carrying drugs did not meaningfully deprive Powell of the use of his truck. To be sure, actions taken by Haycock and other law enforcement personnel occurring after the glimpse of the false floor and ceiling of the camper back and the whiff of marijuana did implicate Powell's constitutional rights, as discussed below. However, since he was not at the scene of the stop at the time it occurred, his interest in using the highways undisturbed by random and intrusive police action and the anxiety it causes was not implicated by the search. The only anxiety the stop caused Powell came with the knowledge that the fruits Officer Haycock obtained through his violation of Maroda's Fourth Amendment rights were used as the basis for his arrest and might be introduced as evidence against him at trial. As such, Powell's motion to dismiss this evidence is nothing more than an "attempt[ ] to vicariously assert violations of the Fourth Amendment rights of others" that *Alderman* and its progeny have condemned. *Salvucci*, 448 U.S. at 86.

IV. REMAINING FOURTH AMENDMENT ISSUES

Powell also challenges the visual inspection of the camper back Haycock made when he looked through the back window of the plastic shell, Haycock's entry into the camper back and his removal of the false floor and false ceiling that exposed the two hidden storage areas, his arrest in Wisconsin, and the search of his car at the time of his arrest. As to Officer Haycock's glance through the window into the camper-back, the Supreme Court observed in *Horton v. California*, 110 S. Ct. 2301, 2306 (1990), that "[i]f an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." Here, Powell's only basis for objecting to what Officer Haycock observed through the window of the truck as he stood outside is that Officer Haycock had gained the ability to look through the window only by means of the prior invalid vehicle stop. As we have already concluded, however, he has no standing to object to that stop. By extension, Powell has no standing to challenge Haycock's glance through the window.

Assuming that he is the owner of the truck or claims a possessory interest in its contents, Powell does have standing to challenge both Haycock's entry into the camper back when he smelled the marijuana and his subsequent removal of the false floor and false ceiling. However, both fall within exceptions to the warrant requirement. What brought Haycock to the door of the camper back was Maroda's offer to show Haycock that there was nothing in the truck. Maroda's invitation, which he had apparent authority to make, *see Illinois v. Rodriguez*, 110 S. Ct. 2793, 2799 (1990), created consent for Haycock to poke his head through the door of the camper back. The smell of marijuana, the false floor and ceiling, and Maroda's nervousness together gave Haycock probable cause to inspect the truck, which falls within the vehicle exception to the warrant requirement. *See California v. Carney*, 471 U.S. 386, 390-93 (1985); *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970).

Turning to the conduct of the DEA agents in Wisconsin, the discovery of marijuana in the pickup, as well as Maroda's statements to Haycock and the Milwaukee DEA Agents and the notebook of instructions from Powell, established probable cause for his arrest; the contemporaneous search of Powell's person was a legitimate search incident to arrest. *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *United States v. Edwards*, 885 F.2d 377, 383 (7th Cir. 1989). The search of Powell's car trunk was supported by Maroda's statements to the DEA that Powell had told him that at the time he received the marijuana he would give Maroda $100,000 in cash to take back to Arizona, statements which gave the police probable cause to believe Powell was presently in possession of the cash and that it was somewhere in his car. Like the camper, the car falls within the vehicle exception, and DEA agents with probable cause to believe that evidence of criminal activity was located somewhere within the vehicle could search the trunk. *United States v. Ross*, 456 U.S. 798, 823 (1982); *United States v. Alvarez*, 899 F.2d 833, 839 (9th Cir. 1990).

V. CONCLUSION

Because we decide that Powell has no standing to challenge the one Fourth Amendment violation at issue in this case, his conviction is

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—4-11-91—500

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 88-CR-175

JEFFERY RICHARD POWELL,

Defendant.

DECISION AND ORDER

On December 20, 1988, the federal grand jury sitting in the Eastern District of Wisconsin returned a three-count indictment against defendant Jeffery Richard Powell. Count I charges the defendant with violating 21 U.S.C. §846 and 18 U.S.C. §2 by conspiring to distribute and possess approximately 1000 pounds of marihuana; Count Two charges a violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 by possessing approximately 1000 pounds of marihuana with the intent to distribute it; Count Three charges a

violation of 18 U.S.C. §1952(a)(3) and 18 U.S.C. §2 by interstate travel in the aid of a criminal enterprise.

At his arraignment on December 20, 1988, the defendant entered a plea of not guilty. Pursuant to an amended pretrial scheduling order, the defendant filed various pretrial motions, including two motions to suppress evidence. Pursuant to a second amended pretrial order entered January 26, 1989, the defendant supplemented his motions to suppress with additional pleadings.

On February 15, 1989, an evidentiary hearing was held before Magistrate Robert L. Bittner on the motions to suppress. Michael Maroda was subpoenaed as a witness for the defendant but failed to appear. The proofs were closed but for the testimony of Maroda, which the Magistrate agreed to hear if Maroda was later

available to testify. The parties were directed to file simultaneous memoranda on the issues presented based upon the record as it then existed.

In a March 17, 1989, Magistrate's Recommendation to Chief Judge Robert W. Warren and Order, The Honorable Magistrate Robert L. Bittner recommended the following:

> (1) denial of the defendant's motion to suppress any evidence derived as the result of the stop and search in the State of Utah of a 1985 Chevrolet truck/camper allegedly owned by the defendant but driven and solely occupied at the time of the stop by Michael Maroda.
>
> (2) denial of the defendant's motion to suppress his arrest in Wisconsin and the evidence obtained through the search, subsequent to his arrest, of his 1979 Chevrolet Caprice.

During a March 31, 1989, supplemental evidentiary hearing, Maroda appeared before the Magistrate as a witness for the defense. The parties were thereafter

ordered to submit simultaneous memoranda addressing the issues as supplemented by the testimony of Maroda.

On April 17, 1989, the Magistrate issued his Supplemental Recommendation. The Magistrate concluded that the defendant Powell had established standing but, nevertheless, denied his motion to suppress evidence obtained as a result of the stop of Maroda and search of the truck in Utah. He concluded that the defendant could not vicariously assert a violation of a third party's (Maroda's) Fourth Amendment rights. Accordingly, the Magistrate found that Maroda's consent to search the camper/truck was legally given and that the evidence secured as the result of that consent to search was constitutionally secured.

On April 27, 1989, the defendant filed an objection to the Magistrate's

recommendation, specifically arguing that the consent to search given by Maroda was invalid. On May 11, 1989, the government responded to the defendant's objections and noted its objection to the Magistrate's conclusion that Powell established standing to challenge the stop and search of the truck/camper in Utah and objected to the Magistrate's conclusion that the stop of Maroda was pretextual.

Presently, the Court addresses the pending objections to the Magistrate's recommendation.

BACKGROUND

On September 17, 1988, Trooper Richard Haycock of the Utah Highway Patrol stopped a 1985 pickup truck driven by Michael Maroda as it entered Interstate 70 in Utah. This particular pickup truck was fitted with a camper type shell installed on the bed of the truck. The truck was

stopped for failing to activate its directional signals as it entered the Interstate from the entrance ramp.

Trooper Haycock testified at the February 15, 1989 evidentiary hearing that pursuant to Utah law, a turn signal is required when entering the Interstate and merging into the lane immediately adjacent to the entrance ramp. Further, the failure to activate the directional signal suggested to the trooper that the signals may not be operating. According to Trooper Haycock, an inoperative signal would be a violation of the Utah vehicle equipment laws.

Trooper Haycock further testified that the movement of a car from an entrance ramp onto an interstate is covered by §41-6-69, Utah Code Ann. (1987).

> "[Section 41-6-69] indicates a person may not turn a vehicle or move right or left upon a roadway or change lanes until the movement can be made with

> reasonable safety and an appropriate signal has been given.... I think I clearly testified that there was a lane change from the ... ramp to the interstate."

Haycock Testimony, February 15, 1989 Evidentiary Hearing, pp. 70-71.

Once stopped, the driver of the truck, Maroda, got out and walked to the rear of the truck. Trooper Haycock also exited his vehicle and met Maroda between his squad car and the truck. Haycock observed that Maroda was scared and nervous. The Trooper requested that Maroda produce a driver's license and vehicle registration.

During this time, Haycock looked into the camper window and noted that the camper floor was not even with the floor of the pickup bed, suggesting to him that there was storage space under the camper floor. Haycock also noticed that the camper's ceiling was at a lower level than its outside roof indicating to him that

there was a storage space between the ceiling and the roof of about one foot.

Maroda produced a document appearing to be an Arizona driver's license. Due to its condition, however, Haycock was unable to read it. Maroda told Haycock his name and that he resided in Mesa, Arizona. Haycock then requested documentation for ownership of the truck and Maroda retrieved a vehicle title from the cab of the truck and gave it to Haycock. The title was in the name "J.R. Powell" at a post office box in Evanston, Wyoming. Maroda told Haycock that the vehicle belonged to Jeff Powell who lived in Cheyenne, Wyoming. Maroda also stated that he was driving to Cheyenne to meet Powell.[1]

---

[1]At the supplemental evidentiary hearing, Maroda gave various testimony that conflicted with the account related by Trooper Haycock at the original evidentiary hearing. Maroda testified that Powell put him in possession of the

Haycock testified that he observed Maroda become increasingly nervous and

---

truck in Tucson, Arizona, for the purpose of driving the defendant's dog and truck to West Bend, Wisconsin, where he was to meet defendant Powell in two and a half (2 1/2) days. Defendant Powell had instructed Maroda to keep the back door of the camper shell locked; not to pick up any hitchhikers; and had prescribed, by means of written instructions, the route which Maroda was to take from Tucson to West Bend. The defendant further instructed Maroda not to exceed the speed limit; to drive straight through to West Bend without any overnight stops; and, in the event he was stopped by law enforcement officers, to display a broken key, which Powell provided, as a reason for not being able to open the back door of the camper shell. Maroda knew there were two (2) secret compartments within the camper shell and the manner in which such compartments were assembled. He was aware of an electric screwdriver placed within the glove compartment of the truck cab and had been instructed to keep it charged. Maroda testified the only windows in the camper were located in its back door and were covered with curtains and were dirty. The only way to enter the camper shell was through the rear door. Maroda had access to the camper shell, within which he stored a garment bag, a jug of water, dog food, and dog bowls.

scared as he was questioning him. Due to prior training and experience, Haycock asked Maroda how much marihuana was inside the camper. Maroda told Haycock there was no marihuana in the truck and offered to open the camper for inspection.

Maroda walked to the camper, removed keys from his pocket, and unlocked and opened the door. At that point, Haycock noted the strong odor of marihuana coming from the truck. Haycock testified that during his 12 years as a police officer, he has smelled marihuana on several hundred occasions.

Haycock frisked Maroda, handcuffed him, and told Maroda to stand on the side of the highway. Haycock then went to his squad and requested a backup officer respond to the scene. Haycock then returned to the camper and made an inspection of the interior of the camper.

He noted that there was no readily apparent access to the space under the floor or in the ceiling. Haycock continued to smell the marihuana. During this time, Maroda was approximately 20 feet away. Maroda never objected to the inspection made by Haycock.

When the backup arrived, Haycock told the second trooper of the situation and instructed him to watch Maroda. Haycock then entered the camper and began to disassemble the floor. Maroda observed these activities and directed Haycock to an electric screwdriver in the cab area of the truck. Haycock used the tool to remove screws holding the flooring in place. Haycock noted that the screws and floor were marred indicating that the flooring had been removed and replaced many times.

After removing the floor panel, Haycock observed numerous packages. By feeling the packages, Haycock determined there was dried plant material inside. Further, the odor of marihuana intensified once the floor panel was removed. Haycock testified the bundles were similar to ones he had seen on prior occasions and which contained marihuana. Haycock discovered similar bundles in the ceiling compartment.

Thereafter, Haycock placed Maroda under arrest, advised him of the charges and his Miranda rights, and asked if he would cooperate with the police. Maroda agreed.

Concerning the truck he was driving, Maroda told Haycock that he needed money and had approached the defendant for a loan. The defendant agreed to give Maroda approximately $7,500.00 if Maroda would drive the truck with the marihuana from

Arizona to West Bend, Wisconsin. The defendant would fly from Arizona and meet Maroda in Wisconsin.

Maroda was given a book with instructions on how to drive to West Bend. Once in West Bend, Maroda had a name and telephone number to call. Maroda was then to receive instructions on where to deliver the marihuana.

Maroda and the truck/camper were transported to a police facility. The truck/camper, with the marihuana inside, was reassembled. Maroda, accompanied by several law enforcement officers, flew from Utah to Milwaukee, Wisconsin. The truck/camper with the marihuana was driven to Milwaukee by two other law enforcement officers.

Upon his arrival in Milwaukee, Maroda was debriefed by agents of the Drug Enforcement Administration, including

Agent William Hehr. Maroda repeated the information given to Haycock, providing specific information about eh marihuana delivery. Maroda told the agents that after the delivery was made to the defendant Powell, Maroda would be given over $100,000.00 in United States currency to return for Powell to Arizona. Maroda did not know exactly when he would receive the money but he had been told he would take the money from West Bend to Chicago and then fly to Arizona.

Based upon a check of the telephone number which Maroda was to call upon arriving in West Bend, the DEA identified a house in West Bend at 5284 Oak Lodge Road. Agent Hehr traveled to West Bend and located the house. Thereafter, plans were made for Maroda to make a controlled delivery of the marihuana.

The truck/camper was driven to West Bend by law enforcement personnel. Maroda was also taken to West Bend. There, Maroda placed a telephone call to the number given to him by Powell. Maroda spoke with a female who told Maroda that she would meet Maroda and lead him to the residence.

Agent Hehr and two other officers waited in the camper section of the truck. Shortly after the phone call, Maroda met with a person referred to as "Jeff". Maroda was instructed to get in the truck and follow "Jeff" who was driving another vehicle. Maroda did as instructed. Agent Hehr was able to observe from the camper window that Maroda was following an older model Chevrolet Caprice with only the driver inside. Agent Hehr also observed that Maroda was led to the same residence at 5284 Oak Lodge Road, West Bend, which

Hehr had previously identified.

Once the truck/camper was parked in the driveway of the residence, Hehr and the two other agents got out of the camper and arrested the defendant Powell. At the time of his arrest, Powell was outside of the Chevrolet Caprice which he had been driving. The Chevrolet Caprice was parked adjacent to the truck/camper.

After his arrest, Powell was searched by DEA Agent Ray Melick. Taken from Powell's person during the search was a small vial continuing cocaine; two sets of identification, one in the name Jeffery Powell and the other in the name Jeffery Hunter; and the keys for the Chevrolet Caprice. Melick then searched the Caprice and recovered a briefcase from the trunk of the vehicle. Inside the briefcase was approximately $111,000.00 in United States currency, a small amount of marihuana, and

a key for the residence at 5284 Oak Lodge Road, West Bend. Melick recovered an insurance form from the glove compartment of the vehicle.

The items seized from the truck/camper, from the person of the defendant Jeffery Powell, and from the Chevrolet Caprice, are presently maintained as evidence.

GOVERNMENT'S OBJECTIONS

In its May 11, 1989 response to the defendant's objection, the government stated its own objections to the Magistrate's April 17, 1989 Recommendation. The government takes exception to the magistrate's conclusions that the stop of Michael Maroda in Utah was pretextual and that Powell established standing to challenge the stop and search in Utah.

First, the Court will address the timing questions raised by the

government's filing of objections more than ten days after the Magistrate's recommendation was issued. Local Rule 13.03 states, in part:

> "Within ten (10) days after service of a copy of the recommended disposition ... [objecting] party shall file with the clerk of court and serve on all parties written objections specifically identifying the portions of the proposed findings, recommendations, or report to which objection is made and the basis for such objection."

In an April 17, 1989 letter to the parties accompanying a copy of his Supplemental Recommendation, and on the last page of the Supplemental Recommendation, Magistrate Bittner informed the parties that written objections must be filed within ten days of the dating of this recommendation. The government did not file its objections within ten days of the recommendation, but rather waited until responding to the

defendant's objections to note its objections. The defendant has not objected to the government's untimely filing nor has he submitted a response to the government's objections.

Under the Local Rules, a district court

> ...shall make a de novo determination of those portions to which objection is made and may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may receive further evidence or recommit the matter to the magistrate with instructions.

Local Rule 13.03(c). The Court believes that the government's objections have substantial merit and warrant consideration. However, the Court notes its disapproval of the government's disregard of the local rules in the filing of its objections.[2] When parties disregard

---

[2]Due to its disregard of the scheduling under the Local Rule, the Court hereby SANCTIONS the government $25.00. The amount must be paid to the Clerk of the Court's pro bono fund within

the local rules and scheduling deadlines, the Court's calendar often is put in disarray and other cases are subject to delay.

PRETEXTUAL NATURE OF THE STOP

It is a well established rule that an arrest may not be used as a mere pretext to avoid the warrant requirement of the Fourth Amendment. United States v. Lefkowitz, 285 U.S. 452, 467 (1932). In his March 17, 1989 Recommendation, the Magistrate correctly points out that in United States v. D'Antoni, 856 F.2d 975, 979 (7th Cir. 1988), the Seventh Circuit states the test for determining whether an investigatory stop is pretextual. March 17, 1989 Recommendation, p. 12. In D'Antoni, the Seventh Circuit adopted the following test of the Fifth Circuit:

'When a defendant alleges that

30 days from the date of this order.

> an arrest was pretext to conduct an otherwise impermissible search, the appropriate inquiry is whether a reasonable officer would have made the arrest absent an illegitimate motive to search.'

D'Antoni, 856 F.2d at 979 (citing United States v. Johnson, 815 F.2d 309, 315 (5th Cir. 1987)).

The Magistrate concluded that "the stop of Maroda was pretextual since a reasonable law enforcement officer would not have made it, absent an illegitimate motive to search." March 17, 1989 Recommendation, p. 13. Section 41-6-69, Utah Code Ann. (1987), the law under which Trooper Haycock believed he was entitled to stop Maroda, provides:

> (1) (a) A person may not turn a vehicle or move right or left upon a roadway or change lanes until the movement can be made with reasonable safety and an appropriate signal has been given.
>
> (b) A signal of intention

> to turn right or left or to change lanes shall be given continuously for at least the last three seconds preceding the beginning of turn or change.

The Magistrate disagrees with Trooper Haycock's interpretation of §41-6-69. He does not believe that "a merger from a freeway ramp into a traffic lane constitutes a lane change requiring signaling under §41-6-69 ...." March 17, 1989 Recommendation, p. 13. The Magistrate points to The Utah Driver Handbook which contains a diagram showing the proper actions to be taken by a driver entering the freeway. There is no mention of any signaling requirement in the handbook. Further, the Magistrate reasons that "logic suggests no reason for such a requirement since a car traveling on the freeway would be unable to view the signal of a merging car until the merger was

largely completed." Id. Finally, the Magistrate states that the pretextual nature of the stop is demonstrated by Trooper Haycock's failure to issue a citation for the alleged violation(s) or even discuss them with Maroda.

As noted above, Local Rule 13.03(c) permits a district court to make a de novo determination of portions of a magistrate's recommendation objected to by the parties. The Court interprets this rule as giving it complete discretion in accepting or rejecting, in whole or in part, a magistrate's recommendation. However, this Court does not believe a district court should disregard a magistrate's recommendation lightly. The magistrates have developed extensive expertise in pre-trial matters and too frequent instances of disregarding those recommendations can lead to the point of

undermining the purpose of having magistrates.

Nonetheless, upon review of the facts of this case, the Court believes that §41-6-69 can be interpreted to include the act of entering a freeway from an on-ramp. Also, under the requirements of D'Antoni, the Court believes that it was reasonable for Trooper Haycock to stop Maroda under the reasonable interpretation of §41-6-69.

The movement of the truck driven by Maroda from the "on-ramp" or "merge lane" into the adjacent through lane of traffic on the interstate reasonably can be interpreted as a "change of lanes" under §41-6-69. The Court also believes Maroda's actions can be interpreted as a "move right or left upon a roadway" under §41-6-69. The Court sees logic in requiring a signal for such an action because vehicles traveling in the adjacent

through lane of traffic on the interstate should be alerted by vehicles on the entering ramp of what point the entering vehicles intend to move into the through

lane.[3] Vehicles should not be allowed to haphazardly force their way into through lanes of traffic without properly signaling. Further, because of the

---

[3]A signal is a logical precautionary measure for vehicles entering through lanes of traffic on an interstate. See Utah Driver Handbook, p. 54, which states:

> . . .
>
> 8. The driver who forces his way back and forth in traffic and doesn't signal or look where he is going is a danger to himself as well as other drivers.
>
> a. Change lanes only to pass, get off the freeway, or enter the correct lane for an upcoming route separation in the freeway.
>
> b. Never force your way between cars. If everyone were to keep a safe following distance, our freeways would run more smoothly.
>
> c. Signal for three seconds before you change lanes.
>
> d. Always check your blind spots. (Emphasis added.)

various lengths of entrance ramps, vehicles can enter the interstate at various points and thus should be required to signal their entrance.

The Magistrate gives great weight to the diagram and instructions in The Utah Driver Handbook. However, the Court sees the Utah statutes, not The Utah Driver Handbook, as the controlling authority in this matter.[4] There is no evidence that the handbook has been accepted as law by the Utah state legislature, giving it as much legal weight as the state statutes. The book explains driving procedures; however, it does not thoroughly interprete the state's driving laws.

---

[4]Further, the book appears contradictory on various points. Compare paragraphs "7" and "8" on pages 53-54. One paragraph ("7") seems to indicate a signal is not required when entering a freeway while the other paragraph ("8") seems to require a signal.

The Court also disagrees with the Magistrate's claim that there is no reason for a signal by a car entering an interstate because a vehicle traveling on an interstate would be unable to observe the merging vehicle until the merger was largely completed. The ability of a vehicle on an interstate to see the signal of an entering vehicle would depend on the positioning of the entrance ramp in relation to the interstate. Entrance ramps are of various widths, lengths, inclines and declines. The Magistrate's broad statement overlooks such physical factors.

The Magistrate's final argument is that a pretextual stop is suggested by Trooper Haycock's failure to issue a citation for the alleged violation(s) or even discuss them with Maroda. The Court disagrees with this argument in light of the

preoccupying circumstances that Trooper Haycock was soon to encounter after the initial stop of Maroda. It is obvious that Trooper Haycock's attention shifted from writing a traffic citation for a minor violation once he discovered the existence of approximately 1000 pounds of marijuana in the back of the truck driven by Maroda. Further, because Maroda agreed to cooperate with the authorities after being placed under arrest, Trooper Haycock was preoccupied with obtaining more information related to the source of the marijuana from Maroda. Considering the seriousness of drug-related offenses in comparison to minor traffic offenses, the Court cannot fault Trooper Haycock for pursuing his investigation of the marijuana source and not taking the time to write out a traffic citation.

Based on its foregoing findings, the Court does not accept the Magistrate's recommendation that the stop of Maroda was a pretextual stop. The stop of Maroda was proper.

POWELL'S STANDING TO CHALLENGE THE STOP AND SEARCH IN UTAH

Based on the facts elicited from Michael Maroda at the supplemental evidentiary hearing, the magistrate determined that the defendant had a legitimate expectation of privacy in the camper shell of the truck driven by Maroda in Utah, thus establishing standing to challenge the stop and search.

The Magistrate based his conclusion on the following facts: (1) the defendant owned the truck, (2) the defendant took precautions to ensure the privacy of the camper shell, and (3) although the defendant was not in possession of the truck at the time of the search,

possession of the vehicle was transferred to Maroda for a limited time and purpose with explicit instructions as to the manner in which Maroda should utilize the vehicle.

The Court must determine whether the defendant had a legitimate expectation of privacy in the truck searched or the property seized. Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980); Rakas v. Illinois, 439 U.S. 128 (1978), reh'g denied, 439 U.S. 1122 (1979). A defendant's Fourth Amendment rights are violated only when the challenged conduct invades the party's legitimate expectation of privacy rather than that of a third party. United States v. Payner, 447 U.S. 727, 731, reh'g denied, 448 U.S. 911 (1980); United States v. Williams, 737 F.2d 594, 616 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985). As movant

for a motion to suppress, Powell has the burden of establishing a legitimate expectation of privacy in the truck. See United States v. Peters, 791 F.2d 1270, 1281 (7th Cir.), cert. denied, 479 U.S. 847 (1986). As explained in Peters, 791 F.2d at 1281:

> [T]he Supreme Court has stated, "this inquiry...normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy' -- whether...the individual has shown that 'he seeks to preserve [something] as private.' The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable' -- whether the individual's expectation, viewed objectively, is 'justifiable' under the circumstances," Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979) (quoting Katz v. United States, 389 U.S. 347, 353, 351, 361, 88 S.Ct. 507, 512, 511, 516, 19 L.Ed.2d 576 (1967) (citations omitted)).

There is no "bright line" test; rather,

the determination is based on analysis of whether the facts of a particular case give rise to a legitimate expectation of privacy. Rakas v. Illinois, 439 U.S. at 144. The factors relevant to application of the two (2) prong test for a legitimate expectation of privacy are:

> [1] whether the defendant has a possessory [or ownership] interest in the thing seized or the place searched, [2] whether he has the right to exclude others from that place, [3] whether he has exhibited a subjective expectation that it would remain free from governmental invasion, [4] whether he took normal precautions to maintain this privacy and [5] whether he was legitimately on the premises.

United States v. Peters, 791 F.2d at 1281 (citing United States v. Haydel, 649 F.2d 1152, 1155 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982)).

The evidence obtained at the supplemental evidentiary hearing indicates that the defendant did take precautions to

ensure the privacy of the camper shell on the truck and did transfer possession of the truck to Maroda for a limited purpose. However, the Court does not believe any evidence at the supplemental hearing proved that the defendant actually owned the truck driven by Maroda. In its March 17, 1989 Recommendation, the Magistrate found that the defendant had not established a reasonable expectation of privacy in the truck because: (1) he was not in possession of the truck when it was stopped in Utah, and (2) he has not established that he is the J.R. Powell of Evanston, Wyoming, listed on the certificate of title. March 17, 1989 Recommendation, p. 11.

At the original evidentiary hearing, the defendant did not present any testimony to establish ownership of the truck. The Magistrate noted that this

"evidentiary void is of particular concern to the Court since the defendant's father is apparently known as 'J.R. Powell.'" Id. At the supplementary hearing, the only information received in support of defendant's ownership of the truck was the hearsay testimony of Maroda. Maroda testified that the defendant told him that he owned the truck.

Maroda's testimony on the ownership of the truck consisted of the following:

> (Defense counsel Giesen's direct examination of Maroda)
>
> Q. All right, I will show you exhibit D-5 and ask if you can identify that, please?
>
> (Maroda)
>
> A. That's the rear end view of the truck that I was driving in December.
>
> Q. Is this the truck that was owned by Jeffrey Powell?
>
> A. Yes, it is.
>
> Q. I show you, --
>
> (Assistant U.S. Attorney)

MR. KANTER: Objection judge, beyond his knowledge. He knows it was in his possession, doesn't know who owned it and ask that it be stricken.

(Magistrate Bittner)

THE COURT: I think that objection is well taken.

Mr. Giesen:

Q. Did Jeffrey ever tell you whose truck that was?

MR. KANTER: Objection, judge.

THE COURT: Well, its hearsay, Mr. Giesen.

Mr. Giesen: I was under the understanding we admitted hearsay at the first phase of this.

THE COURT: You may proceed.

A. He told me when he bought it, it was his.

THE COURT: When did he tell you that.

A. That was in February or March of '88, Your Honor.

March 31, 1989 Evidentiary Hearing, p. 12-13.

The Court does not believe that

Maroda's testimony eliminates the "evidentiary void" that originally concerned the Magistrate. The defendant has yet to present any reliable evidence to establish his possessory or ownership interest in the truck. Because of this failure to prove ownership, it follows that the defendant has not proven he had the right to control the use or exclude others from using the vehicle. Peters, 791 F.2d at 1281. Accordingly, the Court finds that the defendant lacks the standing to challenge the search of the truck in Utah.

DEFENDANT'S OBJECTION

The defendant filed an objection to the April 17, 1989 Recommendation. In that recommendation, the Magistrate ruled that: (1) the stop of Maroda was pretextual, and (2) the defendant had an expectation of privacy in the truck which entitled him to

litigate the validity of Maroda's subsequent consent to search the truck. However, because the "taint" (pretextual stop) derived from the violation of Maroda's constitutional rights, the defendant cannot rely upon the "taint" to obtain suppression of the evidence seized in the truck. The defendant, in his objection, argues that the pretextual stop of the truck was a violation of the defendant's Fourth Amendment right to be free from unreasonable seizures because the stop materially interfered with the defendant's possessory interest in the truck.

Based upon the Court's above rulings on whether the stop of the truck was pretextual and on the defendant's standing to suppress, defendant's objection is moot. However, assuming arguendo that there was a pretextual stop of the truck

and the defendant had an expectation of privacy in the truck, the Court would still not suppress the evidence seized from the truck because the defendant cannot assert Maroda's Fourth Amendment rights. United States v. Fuesting, 845 F.2d 644, 672 (7th Cir.) (One cannot vicariously assert another's constitutional rights to be free from unreasonable seizure to establish a substantive claim under the fourth amendment).

The defendant tries to side-step Fuesting by arguing that the illegal stop was not of Maroda, but of the truck which he owned. The Court believes this argument is without merit. Trooper Haycock's stop was of Maroda and, assuming it was pretextual, it was a violation of Maroda's constitutional rights. The search of the truck and its contents,

assuming the defendant has a privacy interest in them, was not a violation of his constitutional right because there was a valid consent to search. See United States v. Matlock, 415 U.S. 164, 171 (1974) (Search was valid where permission to search was obtained from a third party who possessed common authority or other sufficient relationship to the premises or the effects sought to be inspected). Trooper Haycock never searched the truck or its contents prior to the valid consent of Maroda.

SUMMARY

Based on the foregoing, the Court DENIES the defendant's motion and supplemental motion to suppress for illegal stop and seizure of motor vehicles.

SO ORDERED this 9th day of June, 1989, at Milwaukee, Wisconsin.

/s/
Robert W. Warren
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 88-CR-175

JEFFERY RICHARD POWELL,

Defendant.

MAGISTRATE'S SUPPLEMENTAL RECOMMENDATION TO CHIEF JUDGE ROBERT W. WARREN RE: DEFENDANT POWELL'S MOTION TO SUPPRESS - UNLAWFUL STOP AND SEIZURE OF MOTOR VEHICLES

NATURE OF CASE

This Court's initial recommendation and order addressing various pretrial motions of defendant Powell, including a motion and supplemental motion to suppress for unlawful stop and seizure of motor vehicles, was issued on March 17, 1989. Subsequently, on March 31, 1989, the Court at the request of the defendant conducted another hearing for the purpose of

allowing the defendant to present the testimony of one Michael Maroda who, although subpoenaed, failed to appear at the initial hearing. The parties have filed additional briefs.

On the basis of the entirety of the testimony and evidence now before the Court, as well as the consideration of the briefs filed by counsel, this Court makes the following supplemental findings of fact and recommendation.

Supplemental Findings of Fact

When Michael Maroda was stopped by Utah Highway Patrol Officer Richard Haycock on December 17, 1988, he was driving a white Chevrolet pickup truck with a camper shell owned by defendant Powell. Defendant Powell had put Maroda in possession of the truck in Tucson, Arizona for the purpose of driving the defendant's dog and truck to West Bend, Wisconsin, where he was to

meet defendant Powell in two and a half (2-1/2) days. Defendant Powell had instructed Maroda to keep the back door of the camper shell locked; not to pick up any hitchhikers; and had prescribed, by means of written instructions, the route which Maroda was to take from Tucson to West Bend. The defendant further instructed Maroda not to exceed the speed limit; to drive straight through to West Bend without any overnight stops; and, in the event he was stopped by law enforcement officers, to display a broken key, which Powell provided, as a reason for not being able to open the back door of the camper shell. Maroda knew there were two (2) secret compartments within the camper shell and the manner in which such compartments were assembled. he was aware of an electric screwdriver placed within the glove compartment of the truck

cab and had been instructed to keep it charged. Maroda testified the only windows in the camper were located in its back door and were covered with curtains and were dirty. The only way to enter the camper shell was through the rear door. Maroda had access to the camper shell, within which he stored a garment bag, a jug of water, dog food, and dog bowls.

Expectation of Privacy in the Truck

As cited in this Court's prior recommendation, the factors relevant to the application of the two (2) prong test for a legitimate expectation of privacy are:

> [1] whether the defendant has a possessory [or ownership] interest in the thing seized or the place searched, [2] whether the defendant has the right to exclude others from that place, [3] whether he has exhibited a subjective expectation that it would remain free from governmental invasion, [4] whether he took normal precautions to maintain his privacy and [5] whether he was

legitimately on the premises. United States v. Peters, 791 F.2d 1270, 1281 (7th Cir.), cert. denied, 479 U.S. 847 (1986) (citing United States v. Haydel, 649 F.2d 1152, 1155 [5th Cir. 1981], cert. denied, 455 U.S. 1022, [1982]).

Based on facts elicited at the supplemental hearing, it now appears defendant Powell passes the test for a legitimate expectation of privacy in the camper shell. First of all, the truck is owned by the defendant. Secondly, as the owner he took various precautions to ensure the privacy of the camper shell: he constructed secret compartments, curtained the windows, and fabricated a subterfuge in the form of the fiction of a broken key as an explanation for not voluntarily opening the back door. These precautions were obviously taken for the purpose of

ensuring the camper shell would remain free from governmental intrusion. Thirdly, although the defendant was not in possession of the truck at the time of the search, possession of the vehicle was transferred to Maroda for a limited time and purpose with explicit instructions as to the manner in which Maroda should utilize the vehicle.

The facts of this case are in contrast to those of United States v. Peters, 791 F.2d at 1280 where the Seventh Circuit Court of Appeals rejected defendant Peters' claim that he had an expectation of privacy in a Jaguar automobile. In that case, the defendant did not assert legal ownership of the car, although he claimed an "equitable ownership" interest, his testimony did not indicate he had the right to control the use of or to exclude others from using the Jaguar nor did his

testimony indicate he held any subjective expectation of privacy in the vehicle. In contrast, defendant Powell in this case specifically handed over the truck and keys to it to Maroda for the specific purpose of going to an established destination by means of a set route. Defendant Powell had an ownership interest in the truck; had the right to exclude others from it; and by means of the design of the camper shell, took precautions to maintain his privacy interest. Under the totality of these circumstances, defendant Powell retained his expectation of privacy in the truck. See United States v. Dotson, 817 F.2d 1127, 1135 (5th Cir.), vacated in part on other gnds, 821 F.2d 1034 (1987) ("when a citizen loans his car to a friend for a limited period of time, the de facto owner or lawful possessor does not thereby lose his reasonable

expectation of privacy in the vehicle"). Consequently, the defendant has met the Peters test and has established a legitimate expectation of privacy in the truck which affords him standing to challenge its search.

Impact of Pretextual Stop Upon Voluntary Consent

In its prior recommendation, relying on United States v. D'Antoni, 856 F.2d 975, 979 (7th Cir. 1988), this Court found Maroda's voluntary consent to search the camper was tainted by Trooper Haycock's pretextual stop; and therefore, the consent could not be used by the government as a basis for the search. In its supplemental brief, the government now asserts defendant Powell's standing to challenge the search does not extend to a challenge of Maroda's pretextual stop. Relying upon United States v. Fuesting,

845 F.2d 664, 672 (7th Cir. 1988), the government contends defendant Powell cannot share in Maroda's deprivation of a constitutional right and, since it was only a deprivation of Maroda's rights that resulted in a taint of Maroda's otherwise valid consent to search the camper shell, the taint affecting that consent cannot be raised by defendant Powell. United States v. Fuesting seems to be meet this issue head on and to be squarely on point. In Fuesting, the defendant as the owner of the home which was the subject of the search warrant obviously had an expectation of privacy and could challenge the search warrant's validity on such grounds as the existence of probable cause and taint by virtue of a law enforcement officer's prior warrantless entry to his home. However, the court held that the defendant could not challenge the validity

of the warrant based on the fact it included statements given by his wife during a prior seizure alleged to be in violation of her constitutional rights. Like the defendant in Fuesting, defendant Powell has an expectation of privacy in the truck which entitles him to litigate the validity of Maroda's consent to the search. However, because the "taint" previously identified by this Court is derivative in nature, stemming from the prior violation of Maroda's constitutional rights, defendant Powell cannot rely upon such violation to obtain suppression of the evidence seized from the truck. Consequently, the Court now finds that Maroda's consent to search the truck was controlling and is a valid basis for the search of the truck. See United States v. Matlock, 415 U.S. 164, 171 (1974) (where permission to search was obtained from a

third party who possessed common authority or other sufficient relationship to the premises or the effects sought to be inspected.) Accordingly, this Court will recommend the defendant's motion to suppress be denied.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge issue an order **DENYING** defendant Powell's motion and supplemental motion to suppress for illegal stop and seizure of motor vehicles.

Pursuant to 28 U.S.C. §635(b)(1)(B) and (C) and Local Rule 13.03 (E.D. Wis.), written objections to the foregoing recommendation must be filed in duplicate with the Clerk of Court within ten (10) calendar days from the date hereof.

Failure to so file will result in a waiver to your right to appeal.

Dated at Milwaukee, Wisconsin this 17th day of April, 1989.

/s/
ROBERT L. BITTNER
United States Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 88-CR-175

JEFFERY RICHARD POWELL,

Defendant.

MAGISTRATE'S RECOMMENDATION TO CHIEF JUDGE ROBERT W. WARREN AND ORDER

NATURE OF CASE

On December 20, 1988 the federal grand jury sitting in this District returned a three (3) count indictment against defendant Jeffrey Richard Powell. Count One charges the defendant with violating 21 U.S.C. §846 and 18 U.S.C. §2 by conspiring to distribute and possess marihuana; Count Two charges a violation of 21 U.S.C. §841(a)(1) & 18 U.S.C. §2 by possessing marihuana with the intent to distribute it; Count Three charges a

violation of 18 U.S.C. §1952(a)(3) & 18 U.S.C. §2 by interstate travel in the aid of a criminal enterprise. The defendant appeared before this Court for arraignment on December 20, 1988, entering a plea of not guilty. Pursuant to an amended pretrial scheduling order, the defendant filed various pretrial motions, including two (2) motions to suppress evidence. Pursuant to a second amended pretrial order entered January 26, 1989, the defendant supplemented his motions to suppress with additional pleadings. On March 7, 1989 the defendant filed two (2) additional motions, one seeking an order permitting experts' examination and judicial view of evidence in support of motion to suppress, and the other seeking an order compelling the attendance of a witness who previously failed to honor a subpoena for his testimony at an

evidentiary hearing on the motions to suppress. These latter two (2) motions are not yet ripe for decision; however, the balance of the defendant's motions are and will be addressed herein.

MOTIONS TO SUPPRESS EVIDENCE

By the defendant's motion and supplemental motion to suppress for unlawful arrest and seizure of the defendant, the defendant challenges his arrest and search in Wisconsin. By his motion and supplemental motion to suppress for unlawful stop and seizure of motor vehicles, the defendant seeks suppression of any evidence derived as the result of the stop and search of a 1985 Chevrolet truck camper in the State of Utah, and the suppression of evidence recovered during the search of a 1979 Chevrolet Caprice, which was conducted subsequent to the defendant's arrest in Wisconsin.

On February 15, 1989 an evidentiary hearing was conducted on the defendant's motions to suppress. On the basis of the testimony and evidence before the Court, as well as upon consideration of the arguments of counsel, this Court makes the following findings of fact and recommended disposition.

Findings of Fact

On December 17, 1988 Utah Highway Patrol Officer Richard Haycock, co-author of a thirty-four (34) page patrol pamphlet entitled Criminal Interdiction Through Traffic Enforcement stopped a 1985 pickup truck, with a camper-type shell installed on the truck bed, driven by one Michael Maroda as it entered a very rural and desolate portion of Interstate 70 in Utah at the juncture of State Highway 191. Interstate 70 (I-70) is a four (4) lane divided east-west highway, the on-ramp to

the interstate grades upward with a small curve at the end and "simply merges into the right-hand lane of the interstate" (diagrammed in Defendant's Exhibit 8). Trooper Haycock testified he stopped the truck approximately one (1) mile east for failure to signal its merger into the I-70 traffic, as well as for a possible violation of vehicle equipment laws, since the failure to activate the directional signal also suggested the signals might be inoperative. However, Trooper Haycock issued no citation to Maroda. The Utah Driver Handbook, p. 54, includes the following diagram of the procedures to be taken by a driver upon entering the freeway;

(Defendant's Exhibit 12 & 12A)

Upon stopping, Maroda quickly exited the truck and met Trooper Haycock between the squad and the truck. Trooper Haycock observed that Maroda was scared and nervous. Trooper Haycock requested that Maroda produce a driver's license and vehicle registration and quickly looked into the window in the door at the rear of the camper shell to make certain no individuals were secreted inside the camper portion of the pickup. In so doing, Trooper Haycock noticed the floor of the camper was even with the truck sidebed and the ceiling was even with the top of the door these observations suggested to Trooper Haycock that there was storage space under the floor and above the ceiling of the camper shell.

In response to Trooper Haycock's request, Maroda produced a worn Arizona driver's license which Trooper Haycock was

unable to read due to its condition. Maroda told Trooper Haycock his name and that he resided in Mesa, Arizona. Trooper Haycock again requested documentation for the truck and Maroda retrieved a vehicle title from the truck cab that indicated the vehicle belong to J.R. Powell, at a post office box in Evanston, Wyoming. Maroda informed Haycock the vehicle belonged to Jeff Powell who lived in Cheyenne, Wyoming and the two (2) were to meet in Cheyenne. During the course of their conversation, Trooper Haycock observed Maroda grew increasingly scared; his mouth was dry, he went white, was breathing rapidly, and swallowed hard several times. At this point, Trooper Haycock felt the circumstances were similar to those in which he had stopped drug couriers. Consequently, he inquired how much marihuana was inside the truck.

Maroda stated there was no marihuana in the truck and upon his own initiative unlocked and opened the door of the camper shell. That point, Trooper Haycock noted the strong odor of marihuana emanating from the interior of the camper shell, which he recognized because he has smelled marihuana on several hundred occasions during his twelve (12) years as a law enforcement officer. Trooper Haycock then frisked Maroda for weapons, handcuffed him, directed he stand on the side of the highway, and radioed for a back-up officer at the scene. With Maroda standing approximately twenty (20) feet away and making no objection, Trooper Haycock continued to inspect the camper shell interior lifting the carpeting from the floor which revealed an area typically used for storage that had been closed off and screwed down. Upon removing a couple

of screws, Trooper Haycock could see that it was permanently fixed and all the cracks had been filled with caulk. During this inspection, Trooper Haycock continued to smell marihuana, although there was nothing in this visible portion of the camper to account for such smell.

When the back-up arrived, Trooper Haycock entered the camper and began to disassemble the floor, which had a door held in place with slotted screws. Observing these activities, Maroda offered Trooper Haycock the use of an electric screwdriver which was in the cab area of the truck. As Trooper Haycock removed the screws holding the flooring in place, he noted the screws and floor were marred, indicating repeated removal and replacement of the flooring. After removing the floor panel, the odor of marihuana intensified and Haycock observed

numerous large bundles sealed in plastic and covered with self-adhesive tape. By feeling the bundles, Trooper Haycock determined they contained a dried plant material. These bundles were similar to ones containing marihuana which Trooper Haycock had seen on prior occasions. The same type of bundles were also found by Trooper Haycock in the ceiling compartment.

Trooper Haycock then placed Maroda under arrest, advised him of the charges and his Miranda rights and inquired whether the defendant would cooperate with law enforcement authorities. Maroda agreed and told Trooper Haycock that a second truck carrying 1200 to 1500 pounds of marihuana was being driven to Boston, Massachusetts by J.R. Powell, the defendant's father. Concerning the truck which he was driving, Maroda told Trooper

Haycock that he had approached the defendant, Jeffrey Powell, for a $7500.00 loan which the defendant had agreed to give him, if Maroda drove the truck containing marihuana from Arizona to West Bend, Wisconsin. The defendant had given Maroda a notebook with instructions on how to drive to West Bend, as well as a name and telephone number to call upon arriving in West Bend. Maroda was then to receive additional instructions on where to deliver the marihuana. Additionally, the defendant had given Maroda a second set of keys to the camper shell with the end of the key broken off and had instructed Maroda that, if he was stopped, to produce the broken key and explain the camper shell could not be opened.

Subsequently, the truck with the marihuana inside, was reassembled and driven to Milwaukee by law enforcement

officers. Maroda was flown to Milwaukee.

Upon arriving in Milwaukee on December 18, 1988, Maroda was debriefed by Drug Enforcement Administration (hereinafter referred to as DEA) agents, including Special Agent William Hehr. Maroda stated he was instructed by the defendant to transport the load of marihuana to Wisconsin on his behalf and to call a telephone number once he reached southeastern Wisconsin. The telephone number was determined by DEA agents as that of a West Bend, Wisconsin residence. Maroda also told the agents that, following the delivery, he was to take $100,000.00 in currency back to Arizona. Maroda did not know exactly when he would receive the money, but had been told he should take the money from West Bend to Chicago and then fly to Arizona.

Based upon a check of the West Bend telephone number, the DEA identified a house located at 5284 Oak Lodge Road in that community. Once Special Agent Hehr located the house, plans were made for Maroda to make a controlled delivery of the marihuana. The truck and Maroda were both conveyed to West Bend by law enforcement personnel. There Special Agent Hehr and two (2) other officers stationed themselves in the camper portion of the truck while Maroda placed a telephone call to West Bend telephone number. He spoke with a female who told him that she would meet him and lead him to the residence. Shortly after the telephone call, Maroda met with "Jeff" who instructed him to get into the truck and follow him. Maroda did as instructed and Special Agent Hehr was able to observe from the camper window that Maroda was

following an older model Chevrolet Caprice with only the driver inside, and that Maroda was led to the same residence which had previously been identified as matching the West Bend telephone number. Once the truck was parked in the driveway of the residence, Special Agent Hehr and the two (2) other agents got out of the camper and arrested the defendant who was outside of the Chevrolet Caprice he had been driving. He was then searched by DEA Special Agent Melick. The search of the defendant's person produced a vial containing cocaine; two (2) sets of identification, one in the name of Jeffrey Powell and the other in the name of Jeffrey Hunter; and the keys for the Chevrolet Caprice. The Caprice was then searched. An insurance form was recovered from the glove compartment of the vehicle and an unlocked briefcase was seized from the trunk of the vehicle. The

briefcase was opened without a warrant and was found to contain approximately $111,000.00, a small amount of marihuana, and a key for the West Bend residence. The defendant was then taken to the Washington County Sheriff's Department and the vehicle and all of the evidence seized was taken into custody.

Expectation of Privacy in the Truck

A threshold question is whether defendant Powell had a legitimate expectation of privacy in the premises searched or property seized. Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980); Rakas v. Illinois, 439 U.S. 128 (1978), reh'g denied, 439 U.S. 1122 (1979). A defendant's Fourth Amendment rights are violated only when the challenged conduct invades the party's legitimate expectation of privacy rather than that of a third party. United States v. Payner, 447 U.S.

727, 731, reh'g denied, 448 U.S. 911 (1980); United States v. Williams, 737 F.2d 594, 616 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985). As movant for a motion to suppress, defendant Powell has the burden of establishing a legitimate expectation of privacy in the truck. See United States v. Peters, 791 F.2d 1270, 1281 (7th Cir.), cert. denied, 479 U.S. 847 (1986). As explained in United States v. Peters, 791 F.2d at 1281:

> [T]he Supreme Court has stated, "this inquiry . . . normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy' -- whether ... the individual has shown that 'he seeks to preserve [something] as private.' The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable' -- whether the individual's expectation, viewed objectively, is 'justifiable' under the circumstances," Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d

> 220 (1979) (quoting Katz v. United States, 389 U.S. 347, 353, 351, 361, 88 S.Ct. 507, 512, 511, 516, 19 L.Ed.2d 576 (1967) (citations omitted)).

There is no "bright line" test; rather, the determination is based on analysis of whether the facts of a particular case give rise to a legitimate expectation of privacy. Rakas v. Illinois, 439 U.S. at 144. The factors relevant to application of the two (2) prong test for a legitimate expectation of privacy are:

> [1] whether the defendant has a possessory [or ownership] interest in the thing seized or the place searched, [2] whether he has the right to exclude others from that place, [3] whether he has exhibited a subjective expectation that it would remain free from governmental invasion, [4] whether he took normal precautions to maintain this privacy and [5] whether he was legitimately on the premises.

United States v. Peters, 791 F.2d at 1281 (citing United States v. Haydel, 649 F.2d 1152, 1155 (5th Cir. 1981), cert. denied,

455 U.S. 1022 (1982)).

Applying the foregoing factors to the facts of this case, the Court concludes defendant Powell has not established he had a reasonable expectation of privacy in the truck. Defendant Powell was not in the possession of the truck when it was stopped in Utah and he has not established that he is the J.R. Powell of Evanston, Wyoming listed on the certificate of title. A personal history of the defendant filed with the Court on December 23, 1988 in conjunction with a motion for release from custody states that "Arizona has been Jeffrey's life-long home", and makes no mention of any link between the defendant and Evanston, Wyoming. The defendant also failed to present any testimony in an effort to establish his ownership of the truck. This evidentiary void is of particular concern to the Court

since the defendant's father is apparently known as "J. R. Powell." In light of the foregoing, this Court cannot conclude that the defendant has established a legitimate expectation of privacy in the truck.

Alternative Consideration of Legitimacy of Stop and Voluntariness of Consent

If the trial court rejects this Court's conclusion that the defendant lacks an expectation of privacy in the truck, the next question to be resolved is whether Officer Haycock was justified in stopping the truck or whether the stop was merely a pretext to search for evidence of drug trafficking. The parties are in agreement that the initial encounter between Trooper Haycock and Maroda constituted an investigatory stop under Terry v. Ohio, 392 U.S. 1, 21 (1968), which implicates the Fourth Amendment. Law enforcement officers may initiate an investigatory

detention upon "reasonable suspicion" of criminal activity, but such detention must be reasonable in scope and conducted for a legitimate investigatory purpose. When police lack the reasonable suspicion necessary to support a stop, but use a minor violation in order to search a person or a place for evidence of an unrelated serious crime, the stop is merely pretextual. See United States. v. D'Antoni, 856 F.2d 975, 979 (7th Cir. 1988). As noted in United States v. D'Antoni, 856 F.2d 975, 979 (7th Cir. 1988). As noted in United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988), most circuits and commentators agree that an objective analysis of the facts and circumstances of a pretextual stop is appropriate, rather than an inquiry into the officer's subjective intent. The Court of Appeals for this

Circuit engages in an objective analysis of claims of pretextual police action. See United States v. D'Antoni, 856 F.2d at 979; United States v. McCarty, 862 F.2d 143, 148 (7th Cir. 1988). The standard to be applied in such objective analysis is "whether a reasonable police officer would have made the arrest absent an illegitimate motive to search." United State v. D'Antoni, 856 F.2d at 979 (citing United States v. Johnson, 815 F.2d 309, 315 [5th Cir. 1987], cert. denied, ___ U.S. ___, 815 S.Ct. 1032 [1988]). "[S]o long as police do no more than they are legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry. United States v. D'Antoni, 856 F.2d at 979 (citing United States v. Causey, 834 F.2d 1179, 1184 [5th Cir. 1987]).

Under the facts of the case, this Court concludes that the stop of Maroda was pretextual since a reasonable law enforcement officer would not have made it, absent an illegitimate motive to search. Utah statute which controls Maroda's alleged vehicular violation provides:

> (1) (a) A person may not turn a vehicle or move right or left upon a roadway or change lanes until the movement can be made with reasonable safety and an appropriate signal has been given.
>
> (b) A signal of intention to turn right or left or to change lanes shall be given continuously for at least the last three seconds preceding the beginning of turn or change.

Utah Code Ann. §41-6-69 (1987). This Court does not believe a merger from a freeway ramp into a traffic lane

constitutes a lane change requiring signaling under §41-6-69 nor has the government or this Court's research disclosed any authority to that effect. This conclusion is supported by The Utah Driver Handbook diagram showing the proper actions to be taken by a driver entering the freeway -- there is no mention of any signaling requirement. Furthermore, logic suggests no reason for such a requirement since a car traveling on the freeway would be unable to view the signal of the merging car until the merger was largely completed. The alternative reason given by Trooper Haycock based on inoperative signals also falls since there is no underlying signaling requirement. The pretextual nature of the stop is further demonstrated by Trooper Haycock's failure to issue a citation for the alleged violation(s) or even discuss them with

Maroda.

This Court notes that, in arguing that the stop was pretextual, the defendant relies upon United States v. Guzman, 864 F.2d at 1512 asserting that the law of the Tenth Circuit Court of Appeals is controlling in this case because Maroda was stopped in Utah. In Guzman, the court compared the differing approached to the objective analysis of pretextual stops employed by the Fifth and Eleventh Circuit Courts of Appeal and adopted the approach of the Eleventh Circuit. Under that approach, the inquiry is "not whether the officer could validly have made the stop, but whether under the same circumstances, a reasonable officer would have made the stop in the absence of the invalid purpose." United States v. Guzman, 864 F.2d at 1515. Although not pointed out by the defendant, this Circuit in United

States v. D'Antoni, 856 F.2d at 979 applied the Fifth Circuit test for pretextual police action. Under the facts of this case, this Court believes the outcome would be the same regardless of whether the Fifth Circuit or the Eleventh Circuit test was applied. However, in the absence of any supporting authority from the defendant indicating the law of the jurisdiction where the stop occurred controls, this Court has applied the law of the Circuit, in which this District Court is located.

Along with his brief, the defendant proffers as evidence some eighty-seven (87) traffic citations purportedly issued by Trooper Haycock in the "months preceding" the Maroda stop. See Memorandum of Law in Support of Motion to Suppress, p.4 n.2 and Appendix thereto. The purpose for the proffer is to show

that the trooper issued no citations during that period for failure to signal with the rear signal light a merger into a freeway. This Court finds that proffered 87 traffic violation tickets issued between February 1988 and January 1989 to be of little or no probative value as to whether a reasonable officer would have stopped Maroda under the circumstances existing at the time. Consequently, they have not ben considered by this Court in its finding that Trooper Haycock made a pretextual stop of the Maroda truck.

We must next examine what impact Maroda's consent to search has upon the suppression of evidence found in the truck. The mere fact that consent to search is voluntary within the meaning of Schneckloth v. Bustamonte, 412 U.S. 218 (1973) does not mean that it is untainted by a prior illegal seizure. See Brown v.

Illinois, 422 U.S. 590, 603 (1975); United States v. Recalde, 761 F.2d 1448, 1457-58 (10th Cir. 1985). The defendant contends that, even if the threshold finding of voluntariness for Fifth Amendment purposes is shown, such consent is the fruit of the period illegal arrest. The Supreme Court set out a four (4) part test to determine whether a confession is unconstitutionally tainted. Brown v. Illinois, 422 U.S. at 603-04. This test also applies to consent to search given after illegal law enforcement activity. See United State v. Recalde, 761 F.2d at 1458; United States v. Taheri, 648 F.2d 598, 601 (9th Cir. 1981). The court should consider: (1) whether Miranda warnings were administered prior to the consent; (2) the temporal proximity of the arrest to the confession; (3) the presence of intervening circumstances; and (4) the purpose and

flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. at 603-04. The government bears the burden of showing the admissibility under these factors. United States v. Taheri, 648 F.2d at 601.

In this case, Maroda consented twice to the search of the truck. The first time was when he unlocked the back of the camper shell to allow Trooper Haycock to make an inspection in response to Haycock's inquiry as to how much marihuana he was transporting. The second time was when he offered an electric screwdriver to Trooper Haycock to assist him in opening the door in the floor of the truck. Both of these consents were voluntary in the sense of Schneckloth v. Bustamonte, 412 U.S. at 219, in that they were the product of Maroda's free will and were, in fact, spontaneous offers which he made to Trooper Haycock. However, this court

deems that, under the framework of Brown, there is insufficient attenuation to dissipate the taint from the pretextual stop of Maroda. Miranda warnings were administered prior to the consents. However, that fact alone is not dispositive. See United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1300 (9th Cir. 1988); United States v. Recalde, 761 F.2d at 1458. Here, the consent was given within minutes of the illegal stop. no intervening circumstances such as a subsequent release from custody, an appearance before a United States Magistrate, discussion with a lawyer, or subsequent conviction or unrelated charges sufficient to break the casual connection between the stop and the consent took place. See United States v. Delgadillo-Velasquez, 856 F.2d at 1300. Finally, the pretextual stop of Maroda cannot be

characterized as innocent and falls within the scope of purposeful, if not flagrant, misconduct. This Court also rejects the government's alternative suggestion that the search of the truck was valid under the precepts of United States v. Ross, 456 U.S. 798 (1982). The odor of marihuana which gave rise to probable cause was obtained by virtue of a tainted consent.

In sum, this Court concludes defendant Powell has not established that he had a legitimate expectation of privacy in the 1979 Chevrolet truck and will recommend the defendant's motion to suppress for unlawful stop and seizure of motor vehicles and supplemental motion to suppress for unlawful stop and seizure of vehicles be denied. However, in the alternative, if the trial court finds defendant Powell did have a legitimate expectation of privacy in the truck, then

it should grant the defendant's motion to suppress on the grounds the stop was pretextual and there was no attenuation of the taint which attached to the consent to search by virtue of the prior illicit stop.

Legality of Defendant's Arrest and Seizure of Car

At the time of the defendant's arrest, law enforcement agents possessed abundant facts which constituted probable cause to believe the defendant had committed or was committing a violation of the criminal laws, particularly conspiracy and possession with intent to deliver marihuana. They knew the truck which they had intercepted in Utah was dispatched pursuant to the plan and directive of defendant Powell and that the marihuana was to be delivered to the defendant in West Bend, Wisconsin. They witnessed a

meeting between Maroda and an individual referred to as Jeff, who led Maroda to the site where he was to deliver the marihuana. Since the arrest of defendant Powell was based upon probable cause, no warranted was required. See Payton v. New York, 445 U.S. 573, 590-91 (1980); United States v. Watson, 423 U.S. 411 (1976). The subsequent search of the defendant's person was incident to his arrest and therefore justified. See United States v. Robinson, 414 U.S. 218 (1983); Chimel v. California, 395 U.S. 752 (1969). Similarly, under New York v. Belton, 453 U.S. 454 (1981), a law enforcement officers properly searched the passenger compartment of the automobile and containers within it was a search incident to defendant Powell's arrest.

There remains to be addressed the validity of the search of the trunk and

the unlocked briefcase which it contained. The government asserts that the search falls within the exception to the search warrant requirement set forth in United States v. Ross, 456 U.S. 798 (1982) because there was probable cause to believe that contraband was concealed within the automobile. This Court agrees, based on the extensive knowledge which Maroda provided to law enforcement officers, which was corroborated by the actions of Maroda and "Jeff" while under police surveillance. The arrest of the defendant was effected immediately before the intended consummation of a large drug deal. As such, there was probable cause to believe that the vehicle which conveyed the defendant to the site of the transaction would be likely to contain contraband in the form of cash, guns, drugs, or drug records.

A closely related, but independent ground for upholding the search of the trunk and briefcase is based upon 21 U.S.C. §881(a)(4) which provides that all vehicles which are used for or intended for use to transport or in any manner facilitate the transportation, sale, receipt, possession, or concealment of a controlled substance are subject to forfeiture. The search of a car subject to forfeiture may be made without process when the seizure is incident to an arrest, 21 U.S.C. §881(b)(1) or when the Attorney General has probable cause to believe that it has been used in violation of the laws pertaining to controlled substances, 21 U.S.C. §881(b)(4). In this case, the seizure of the automobile was incident to the defendant's arrest and the arresting officers also had probable cause to believe the car was being used to

facilitate a drug transaction. See United States v. One 1982 Buick Regal VIN No. 1G4AM47A2CR149469, 670 F. Supp. 808, 811 (N.D. Ill. 1987) (facilitation has been broadly construed to mean any use of a vehicle which makes trafficking in contraband less difficult and laborious). Consequently, law enforcement officers were authorized by 21 U.S.C. §881 to seize the car without process. Having validly seized the 1975 Chevrolet Caprice for forfeiture, agents could subsequently search it lawfully which included opening the unlocked briefcase and seizing the currency contraband contained therein. See United States v. $29,000-U.S. Currency, 745 F.2d 853, 856 (4th Cir. 1984); United States v. Steele, 727 F.2d 580, 589 (6th Cir.) cert. denied, 467 U.S. 1209 (1984).

In sum, this Court concludes that the arrest of defendant Powell was based on probable cause and the subsequent search of the defendant and the 1979 Chevrolet Caprice and its contents was lawful, and will recommend the defendant's motion and supplemental motion to suppress for unlawful arrest and seizure be denied.

.....

Dated at Milwaukee, Wisconsin this 17th day of March, 1989.

BY THE COURT:

/s/
ROBERT L. BITTNER
United States Magistrate

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 11, 1991

Before

Hon. William J. Bauer, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

No. 89-3509

JEFFREY R. POWELL,

Defendant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 88 CR 175
Robert W. Warren, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.